

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. 05-CV-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO  
THE CARGILL DEFENDANTS’ MOTION IN LIMINE TO  
EXCLUDE STATEMENT OF COUNSEL (Dkt. #2412)**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“State”), and respectfully responds in opposition to the Cargill Defendants’ Motion in Limine to Exclude Statement of Counsel (Dkt. #2412) (“Motion in Limine” or “Motion”) as follows:

1. Through their Motion in Limine, the Cargill Defendants seek to exclude the following statement of defense counsel Patrick Ryan (“Mr. Ryan”) made during opening statements at the hearings on the State’s Motion for Preliminary Injunction:

And I don’t think there’s any question but that there has been an overapplication of litter on some or many farms. That’s not an issue in our book. I’m certainly not arguing that in terms of phosphorus.

Motion at 2 (quoting 2/19/08 Tr. at 45-46).

2. All Defendants -- including the Cargill Defendants -- have filed a separate Motion in Limine to Exclude Reference to Defense Counsel’s Argument to the Court, also seeking to exclude Mr. Ryan’s statement concerning “overapplication of litter” (Dkt.

#2392). Contemporaneous with the present Response to the Cargill Defendants' Motion in Limine, the State is filing its Response to Dkt. #2392. The State's Response to Dkt. #2392 is fully adopted and incorporated herein.

3. The Cargill Defendants raise two arguments in their Motion in Limine: (a) that Mr. Ryan's statement should be excluded because it is "not evidence"; and (b) because Mr. Ryan represents the Tyson Defendants and not the Cargill Defendants, the Court should "bar the use of [Mr. Ryan's] statement against the Cargill Defendants." Motion at 3.

4. The argument that Mr. Ryan's statement is "not evidence" was raised and fully briefed by Defendants in Dkt. #2392, and the State has fully responded. In sum, Mr. Ryan's statement qualifies as a "judicial admission" and is binding against Defendants. *See, e.g., U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n.4 (10th Cir. 2005) ("Judicial admissions are formal, deliberate declarations which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute."); *United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986); *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984); *Berlin v. Celotex Corp.*, 912 F.2d 465 (Table), 1990 WL 125360, at \*2 (6th Cir. Aug. 29, 1990); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880). In the alternative, even if the Court should determine that Mr. Ryan's statement is not a judicial admission, the statement would still qualify as an evidentiary admission under Fed. R. Evid. 801(d)(2). A statement is not hearsay under Rule 801(d)(2)(D) if it is made by the opposing party's "agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Mr. Ryan's statement

plainly qualifies as an admission under Rule 801(d)(2)(D). Therefore, the Cargill Defendants' argument -- raised for a *second* time in their Motion in Limine -- that Mr. Ryan's statement is "not evidence" should be rejected.

5. As noted, the Cargill Defendants' also assert that Mr. Ryan's statement was not made on behalf of the Cargill Defendants; and, thus, the Court should bar the use of Mr. Ryan's statement against the Cargill Defendants. Motion at 3-4. However, Mr. Ryan's opening statement was made on behalf of all Defendants, including the Cargill Defendants. *See, e.g.*, Ex. A (2/19/08 Tr. at 58) ("Your Honor, there's no public health risk in [the] watershed, much less one created by these defendants."); *id.* at 66 ("Whether any type of vicarious liability can be imposed on the defendants. We say no."); *id.* at 67 ("[T]he reality is that these defendants do not control the poultry growers."). For the purposes of the opening statement, Mr. Ryan was acting as the Cargill Defendants' attorney, or, at the very least, their "agent." Thus, Mr. Ryan's statement can properly be used against the Cargill Defendants. *See Nukem, Inc.*, 400 F.3d at n.4; Fed. R. Evid. 801(d)(2).

6. There is no evidence in the record that the Cargill Defendants objected to Mr. Ryan's statement -- made on their behalf -- concerning "overapplication of litter," and there is no indication that Mr. Ryan's statement applied only to the Tyson Defendants. While Defendants often complain that the State has unfairly made this case about the "industry" rather than individual Defendants, Defendants themselves have largely defended this case as an industry. Mr. Ryan's opening statement is one such example. The Cargill Defendants should not be permitted to pick and choose the portions

of Mr. Ryan's opening statement which best suits their interests. The Motion in Limine should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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